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Supreme Court, U.S.
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No. 95-232

In The

Supreme Court of the United States

October Term, 1995

LLOYD HENDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the 120-day service requirement of Federal Rule of Civil Procedure 4 supplants the forthwith service requirement found in the Suits in Admiralty Act ("SAA").

II. If the 120-day service requirement of Rule 4 does not supplant the forthwith service requirement found in the SAA, whether district courts may extend the time for service provided by the SAA under appropriate circumstances.

LIST OF PARTIES

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REFERENCE TO THE OPINIONS OF THE COURTS BELOW

Court of Appeals Opinion: 51 F.3d 574 (5th Cir. 1995) – Reproduced in Appendix to Petition for Writ of Certiorari

District Court Order: Reproduced in Appendix to Petition for Writ of Certiorari

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its opinion on May 10, 1995. Petitioner did not file a motion for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1). Petitioner timely filed his petition for writ of certiorari on August 8, 1995 which was granted by this Court on November 22, 1995.

STATUTORY PROVISIONS INVOLVED

Suits in Admiralty Act, 46 U.S.C. § 742

Libel in personam.

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in section 1 of this Act. Such suits shall be brought in the district court of the United States for the district in

which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

Rules Enabling Act, 28 U.S.C. § 2072

Rules of procedure and evidence; power to prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

Fed. R. Civ. P. 4(d)(4) and (5)[1]

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

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[1] These subsections were amended in 1993 and renumbered as Rule 4(i).

Fed. R. Civ. P. 4(j)[2]

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

STATEMENT OF THE CASE

Petitioner Lloyd Henderson sustained injuries on August 27, 1991, while employed by the United States as a seaman aboard the M/V DELMONTE, a ship owned by the United States (R. 3-4). After exhausting administrative remedies, he filed suit against the United States on April 8, 1993, in the United States District Court for the Southern District of Texas, Galveston Division (R. 2, App. 5-12).[3] The court had jurisdiction under the Suits in Admiralty Act ("SAA"), 46 U.S.C. § 741-752 and the Public Vessels Act, 46 U.S.C. §§ 781-790.

From the onset, Mr. Henderson experienced a series of difficulties obtaining the proper summons for the United States from the district clerk's office (R. 163). At the same time Mr. Henderson filed his complaint, he

[2] The 1993 amendments reworded this subsection and renumbered it as Rule 4(m).

[3] On motion by the United States, the case was later transferred to the Eastern District of Texas, Beaumont Division (R. 1).

requested the appropriate summons forms and file stamped copies of the complaint (App. 42, 51). However, these summons forms were not sent to Mr. Henderson's counsel, as requested, with the file stamped copies of the complaint (App. 42, 51). The forms were eventually obtained on April 21, 1993, completed by Mr. Henderson's counsel and immediately forwarded to the District Clerk for the Southern District of Texas, Galveston Division (App. 42, 51). Mr. Henderson's counsel finally received the completed summons from the district court on May 4, 1993 (App. 42, 51-52, 54). He sent the summons and complaint via certified mail to the United States Attorney General on May 19, 1993 (R. 163, App. 42). The Attorney General was served on May 25, 1993 (App. 42, 52).

On May 25, 1993, Mr. Henderson's complaint was forwarded to Constable Jack Abercia for service on the U.S. Attorney for the Southern District of Texas (App. 52, 55-56). The summons intended for the United States Attorney, however, was still not in proper form at that point because the deputy district clerk had failed inadvertently to place the seal of the court on the summons. On June 1, 1993, Constable Jack Abercia's office wrote to Mr. Henderson's counsel and informed him that Abercia required the Court's seal on each summons form prior to service (App. 52, 57-58). The constable's office also advised Mr. Henderson's counsel that it needed two additional summons forms (App. 57-58).

Mr. Henderson's counsel again requested, via mail, additional summons forms from the U.S. District Court with the appropriate court seal (App. 52, 59-61). When they were not received, Mr. Henderson's counsel's office

called the Clerk, and informed the Clerk's office of the situation (App. 52).

Mr. Henderson's counsel again requested by mail the summons forms from the District Clerk's office on August 19, 1993 (App. 52, 62-64). The properly sealed summons were not received until August 25, 1993 (App. 52), although they were dated July 22, 1993 (App. 52, 65). The sealed summons were then transmitted a second time to Constable Abercia's office on August 25, 1993 (App. 52, 66-67), two days before the statute of limitations elapsed. (R. 164).

On August 30, 1993, Mr. Henderson filed a motion seeking an extension of time in which to serve the United States Attorney (R. 12-13, App. 13-14). The district court, after presumably finding good cause as required by Rule 4, granted the extension and rendered an order allowing service on or before September 15, 1993 (R. 16, App. 15). The United States Attorney received personal service on September 3, 1993 (App. 33-34).

On November 17, 1993, the United States moved to dismiss the case for want of jurisdiction due to a lack of "forthwith" service as required by the SAA (R. 34, App. 16-38). Mr. Henderson filed his response to the motion on December 16, 1993 (App. 39-85). The district court originally denied the motion, presumably finding that Rule 4 governed the time for service in the case and that the court had the power to grant an extension (R. 107).

Following the court's ruling, however, the Fifth Circuit delivered its opinion in *United States v. Holmberg*, holding that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States.

19 F.3d 1062 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 482 (1994). On May 13, 1994, the government filed a second motion to dismiss based upon the *Holmberg* decision (App. 86-91). The district court reconsidered its ruling in light of *Holmberg* and granted the government's motion to dismiss (R. 189, Pet. App. 8). Although the dismissal was without prejudice, the statute of limitations had already elapsed (R. 189).

Mr. Henderson appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the dismissal, merely reiterating its opinion in *Holmberg* that the SAA's forthwith requirement rather than Rule 4 governs the time for service on the United States (Pet. App. 1). On August 8, 1995, Mr. Henderson filed his Petition for Writ of Certiorari in this Court. This Court granted the Petition on November 22, 1995.

SUMMARY OF THE ARGUMENT

The intent of Congress in enacting the SAA and Rule 4 of the Federal Rules of Civil Procedure compels the conclusion that the 120 day service requirement in Rule 4 supplants the "forthwith" service requirement of the SAA. The inherent conflict between the service provisions in the SAA and Rule 4 has inevitably led to a divergence of opinion among the circuit courts. The Third Circuit has held that Rule 4's 120 day service requirement supersedes the SAA's "forthwith" service provision because it is simply procedural; on the other hand, other circuits have

held that the SAA's "forthwith" requirement represents a waiver of the government's sovereign immunity and cannot be modified by Rule 4 because it is substantive. However, those circuits that have held this provision to be substantive have erroneously based their holdings upon Second Circuit authority decided before 1966 when Congress specifically applied the federal rules of civil procedure to admiralty suits. Additionally, these courts have ignored the fact that at the time the SAA was enacted in 1920, there were no uniform rules in effect governing federal procedure.

Any decision that the forthwith service provision of the SAA is substantive emasculates the intent of the legislature in enacting the SAA. The SAA was enacted by Congress in order to waive its immunity from suit by allowing *in personam* actions against the United States. The SAA specifically provides that suits brought under the Act "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice . . . in like cases between private parties." 46 U.S.C. § 743. Congress even broadened its waiver of sovereign immunity in 1960 by removing the restriction as to merchant vessels. Furthermore, similar statutes in which the government has waived immunity such as the Federal Tort Claims Act and the Tucker Act are also governed by Rule 4 service procedures. The view that the SAA's "forthwith" service requirement is substantive in essence defeats Congress's intent to waive immunity.

The Rules Enabling Act through which the rules of procedure are promulgated specifically states that all conflicting laws "shall be of no further force or effect." 28 U.S.C. § 2072. Congress therefore intended a valid rule

such as Rule 4 to supersede an inconsistent federal statute. This Court has previously held in *Hanna v. Plumer*, 380 U.S. 460 (1965), that Rule 4 which allows service on an executor supplanted a contrary state rule requiring in-hand service because matters of service are governed by the federal rules. Congressional intent to supercede the "forthwith" requirement of the SAA is further evidenced by the fact that present Rule 4 which includes the 120 day service requirement and "good cause" exception was drafted by Congress and not by this Court. Obviously, Congress desired to bring uniformity to the timeliness of service issue.

The inevitable result of the Fifth and other circuits' adoption of the "forthwith" service requirement rather than the 120 days provided by Rule 4 is a drastic variation among the circuits as to what constitutes "forthwith." This Court's determination that the Rule 4 service provisions supplant the "forthwith" service requirement of the SAA would resolve this inconsistency and give effect to legislative intent. The lack of uniformity among the courts concerning the amount of time which is "forthwith" also raises due process concerns since many litigants are denied the right to proceed to trial on the merits. Furthermore, the "forthwith" requirement creates equal protection problems since all other federal actions involving the United States are subject to Rule .. Certainly, Congress did not intend that only seamen should be subjected to this draconian requirement while allowing those injured upon the land to have the advantage of the bright-line time limit in Rule 4.

The Fifth Circuit's interpretation of the SAA's service requirement also incorrectly restricts the district court's

power to extend the time for service under any circumstances. Even if the "forthwith" service requirement applies to suits brought under the SAA rather than Rule 4, the district court should maintain the power to extend the time for service in appropriate circumstances. In an analogous context, this Court has permitted federal courts to toll the limitations period in a federal statute providing for substantive liability. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 556-559 (1974). The facts of this particular case further illustrate the need for a definitive rule which would allow the courts to extend the time period for service under the SAA. Given the problems Mr. Henderson confronted in attempting to serve the United States, the district court's extension of time for serving the government was proper and should be honored by this Court.

ARGUMENT AND AUTHORITIES

I. The 120 Day Service Requirement Of Rule 4 Supplants The Forthwith Service Requirement In The SAA.

A. The Fifth Circuit's Interpretation Of The SAA's Forthwith Service Requirement Conflicts With Third Circuit Precedent.

The manner of service on the United States under the SAA and Rule 4 is essentially the same. Both require that the plaintiff personally serve the United States Attorney

for the district in which the suit is filed[4] and, additionally, serve the Attorney General by mail.[5] Rule 4 and the SAA collide, however, with respect to the time for service on the United States. The SAA fails to provide any specific time for such service, but simply provides that service be "forthwith." Rule 4, on the other hand, provides a specific time limit of 120 days in which to accomplish service and permits the district court to extend the time upon a showing of "good cause."

The confusion regarding the time for service on the United States in suits brought under the SAA has resulted in a divergence in opinion among the circuit courts. The Third Circuit has determined that Rule 4's 120-day requirement supersedes the SAA's forthwith requirement. *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985). Several district courts have held likewise. *E.g., Libby v. United States*, 657 F. Supp. 1251, 1252 (M.D. Fla. 1987); *Phillips v. United States Army Corps of Engineers*, 629 F. Supp. 967, 971 (S.D. Miss. 1986). In contrast, the Second, Fifth, Ninth, and Eleventh Circuits have concluded that the SAA's forthwith requirement applies regardless of Rule 4's 120-day requirement. *E.g. City of New York v. McAllister Brothers, Inc.*, 278 F.2d 708, 710 (2d Cir. 1960); *Owens v. United States*, 541 F.2d 1386, 1388 (9th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977);

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[4] After the filing of this suit, Congress amended Rule 4 to permit the United States Attorney to designate agents to receive process and to permit service on the United States Attorney by mail.

[5] The SAA specifies registered mail; Rule 4 permits registered or certified mail.

Holmberg, 19 F.3d at 1065; *Libby v. United States*, 840 F.2d 818, 820 (11th Cir. 1988).

For the most part, the conflict arises from the determination of whether the SAA's service requirement is substantive or simply procedural. Those courts that consider the forthwith requirement substantive hold that it applies without regard to Rule 4 because the Federal Rules of Civil Procedure do not modify substantive rights. *E.g.*, *Battaglia*, 303 F.2d at 686; 28 U.S.C. § 2072. Those courts that consider the forthwith service requirement procedural hold that Rule 4's 120-day requirement supplants the SAA's forthwith requirement because the Federal Rules supplant all conflicting procedural requirements in federal courts. *E.g.*, *Jones & Laughlin Steel*, 772 F.2d at 66.

The Second Circuit in *City of New York v. McAllister Brothers*, *supra*, was the first court to consider the issue. In that case, the plaintiff served process on the United States Attorney more than two months after filing suit. 278 F.2d at 708. The court held that the plaintiff's failure to comply with the SAA's "forthwith" service requirement deprived the district court of jurisdiction and compelled dismissal. *Id.* at 710. The court reasoned that litigants must strictly comply with technical requirements for service of process upon the government when it has waived sovereign immunity.

Two years later, in *Battaglia v. United States*, the Second Circuit reached an equally harsh result. 303 F.2d 683, 686 (2d Cir. 1962), *cert. dism'd*, 371 U.S. 907 (1962). There, the plaintiff served the United States Attorney on the same day he filed the complaint. The plaintiff failed to

serve the Attorney General by registered mail, however, until approximately four months later. The court construed the SAA to require both forthwith service on the United States Attorney and forthwith service by registered mail on the Attorney General. Accordingly, the court held that the lack of forthwith service warranted dismissal. *Id.* at 686. The rationale for the decision was that the forthwith service requirement constitutes a prerequisite to the United States' waiver of sovereign immunity. *Id.* at 685.

However, in a concurring opinion in *Battaglia*, Justice Friendly strongly criticized the majority opinion. *Id.* at 686-87. Justice Friendly expressed his belief that Congress did not intend this provision of the SAA to be considered jurisdictional; he also believed that Congress intended for the courts to treat the government as in cases involving private party litigants, since the Act was a comprehensive waiver by the United States of sovereign immunity. *Id.* at 686. Nonetheless, Justice Friendly felt compelled to concur in the majority opinion because he "perceiv[ed] no indication of dissatisfaction with the course of decision by [his] brothers sufficient to warrant requesting consideration *in banc*." *Id.* at 687.

The Ninth Circuit blindly followed the decisions of the Second Circuit in *Owens v. United States*, 541 F.2d at 1388. Nevertheless, the court noted that "[t]he wisdom of the Second Circuit rule might be doubted, particularly in view of criticism within that court." *Id.* at 1388. *See also Barrie v. United States*, 615 F.2d 829, 830 (9th Cir. 1980) (following *Owens*). Several years later, in *Amella v. United States*, 732 F.2d 711, 714 (9th Cir. 1984), the court also felt obligated to follow the earlier opinions on the issue,

noting that although it "may not like § 742", it was compelled to follow it.

Similarly, in *Kenyon v. United States*, 676 F.2d 1229, 1231 (9th Cir. 1981), the court followed *Owens* with little substantive discussion. The *Kenyon* opinion also drew criticism from Justice Boochever who wrote a concurring opinion. Justice Boochever explained that it is the "first, or at most the first two sentences of 46 U.S.C. § 742 [which] constitutes the waiver of sovereign immunity by the United States" and that "[t]he subsequent sentences concerning service of process constitute a procedural requirement. . . . " *Id.* at 1231. Justice Boochever also suggested that were it not for the previous decisions on the issue, he "would conclude that the service of process provision in section 742 is procedural and has been supplemented by the provisions of Rule 4 specifying the method of service on the United States. . . . " *Id.* at 1232.

More recently, the Eleventh and Fifth Circuits also have adopted the view that forthwith service constitutes a matter of substance unaffected by the Federal Rules. *Libby v. United States*, 840 F.2d at 820; *Holmberg*, 19 F.3d at 1065; *Henderson*, 51 F.3d at 576. These courts have rigidly followed the approval of the Second and Ninth Circuits despite the harsh criticism and results this rule has generated over the years.

The Third Circuit, however, has used the correct and more reasonable analysis. In *Jones & Laughlin Steel*, the plaintiff filed suit on January 18, 1984, and sent notice to the appropriate federal agency the next day but failed to serve the Attorney General and United States Attorney until late March, well within the 120 days required by

Rule 4 but not "forthwith" as required by the SAA. 772 F.2d at 66. The court logically concluded that the SAA's forthwith service requirement constituted a matter of procedure rather than substance. *Id.* at 66. In so concluding, the court relied on the fact that Congress unified admiralty procedure and the Federal Rules in 1966. 112 CONG. REC. 4053 (1966); H. DOC. 391, 89th Cong., 2d Sess. (1966). Thus, the court reasoned that the provisions for service of process found in Rule 4 should govern service on the United States under the SAA. Specifically, the court held:

> This congressional enactment of a uniform 120-day period for accomplishing service of process [under Rule 4] must be read in light of 28 U.S.C. § 2072, [the Rules Enabling Act] which states that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rule 4(j) therefore supersedes the Suits in Admiralty Act's requirement of forthwith service.

772 F.2d at 66.

At least two district courts have adopted the Third Circuit's reasoning. *Phillips*, 629 F. Supp. at 971; *Libby*, 657 F. Supp. at 1252. Other district courts, though bound by circuit precedents to the contrary, have expressed agreement with the Third Circuit's construction of the SAA. For instance, in *O'Halloran v. United States*, the court stated: "This Court finds the Third Circuit approach reasonable, particularly in light of the inherently ambiguous nature of the term forthwith. This Court also believes that rejecting the argument that § 742 is jurisdictional leads

to a fairer result. However, the Ninth Circuit has considered and rejected this very argument." 817 F. Supp. 829, 832 (N.D. Cal. 1993), *aff'd*, 45 F.3d 436 (9th Cir. 1994). *See also Hall v. Maritime Administration*, Civ. Action 92-3030, 1993 U.S. Dist. Lexis 5753 (E.D. La. 1993) (following Fifth Circuit precedent and concluding "with great reluctance" that plaintiff's complaint must be dismissed); *Pezzola v. United States*, 618 F. Supp. 544, 548 (D.C.N.Y. 1985) (dismissing the plaintiffs' complaint because the court is "confined to the *Battaglia* rule"). Only this Court can resolve this conflict and mandate a uniform rule for the timely service of process on the United States in suits brought under the SAA.

B. The Fifth Circuit's Interpretation Of The SAA's Service Requirement As Substantive Frustrates Congressional Intent.

1. The Provisions Of The SAA Negate An Unnecessarily Strict Interpretation Of The Forthwith Service Requirement.

The Fifth Circuit's interpretation of the SAA's forthwith service requirement as substantive, like that of the Second, Ninth, and Eleventh Circuits, fails to capture Congressional intent. Prior to 1916, the government enjoyed immunity from suits alleging damages inflicted by government owned and operated vessels. Recognizing the inequity of declining to compensate those damaged by government vessels, Congress passed the Shipping

Act of 1916,[6] which provided that U.S. vessels employed as merchant vessels would be subject to all laws, regulations and liabilities to which private merchant vessels were subjected. *Id*. However, when later litigants began to use *in rem* actions to seize government vessels, Congress passed the SAA in 1920 in order to allow *in personam* actions against the government.[7] In essence, Congress broadened the waiver of immunity in suits involving damages inflicted by public vessels by enacting the SAA.

From the outset, the plain language of the SAA declared Congress's intent that the government should be treated in the same manner as private litigants. Section 743 of the SAA specifically provides that "[s]uch suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." This provision plainly reveals Congress's intent to treat governmental and private vessels the same.

Continuing to allow the government to enjoy the forthwith service requirement, while private owners and operators of vessels are subject to the service requirements set out in Rule 4, defeats Congressional intent in enacting the SAA to place the government on equal terms with private litigants. *See* 46 U.S.C. § 742. In fact, this Court, in interpreting a different provision of the SAA, noted: "Congress has expressly declared that *when sued under the Suits in Admiralty Act the United States is to have*

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[6] Ch. 451, 39 Stat. 728 (1916) (codified as amended at 46 U.S.C. §§ 801-842 (1982)).

[7] Ch. 95, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. §§ 741-752 (1980)).

its procedural rights determined and governed in the same manner as private parties." United States v. Isthmian S.S. Co., 359 U.S. 314, 324 (1959) (emphasis added). The Third Circuit, in deciding that Rule 4 rather than the SAA's forthwith requirement governs the time for service on the United States, similarly relied on legislative intent in enacting the SAA to treat the United States as a private litigant. *Jones & Laughlin Steel*, 772 F.2d at 64.

Congress's specific intent in including the "forthwith" service requirement in the SAA is less clear. In fact, the legislative history of the Act lacks any explanation for the "forthwith" service requirement. 58 CONG. REC., 66th Cong., 1st Sess. 7317-7318, 7439-7440 (1919); 59 CONG. REC., 66th Cong., 2d Sess. 1692-1693, 1750-1759, 3350-3351, 3629-3631, 3690-3691 (1920). The courts holding that the provision is substantive cite no evidence nor do they rely on legislative history. *E.g., Kenyon*, 676 F.2d at 1231; *McAllister Bros.*, 278 F.2d at 709-710. Their rationale is based exclusively on the archaic principle of a limited waiver of sovereign immunity, which is only contained in the first two sentences of § 742. *Id.* This unnecessarily strict interpretation of the statute frustrates congressional intent that governmental liability equal that of private parties. 46 U.S.C. § 743.

The fact that courts have read this provision as substantive is equally perplexing. Historically, this Court has viewed service provisions which are calculated to give notice as procedural in nature. *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 445-446 (1946). Process has had no direct effect on jurisdiction and is primarily a vehicle for advising a party that he has been sued. *Id.*; *Greene v.*

Lindsey, 456 U.S. 444, 449 (1982) ("Personal service guarantees actual notice of the pendency of a legal action."). Consequently, any interpretation of the service provisions of the SAA as substantive is contrary to clear precedent on related matters.

Other provisions of the SAA also diffuse the view that the forthwith service requirement is substantive and not procedural. Section 745 of the SAA contains a two year limitations bar which operates to defeat jurisdiction. 46 U.S.C. § 745. Service is not a jurisdictional prerequisite for the timely "commencement" of a suit under the SAA. *Battaglia*, 303 F.2d at 685. Therefore service should not be considered as a substantive provision of the SAA. *See*, Gregory Ressa, *The Forthwith Service Requirement Of The Suits In Admiralty Act*, 54 FORDHAM L. REV. 1195, 1201 (1986).

Concluding that the forthwith service requirement is anything other than procedural seems particularly illogical in light of the other service requirements found in the SAA. Justice Boochever illustrates this point in his concurrence in *Kenyon*:

> Section 742 [of the SAA] specifies even the manner of mailing "by registered mail to the Attorney General of the United States." Certainly that provision is not to be considered as jurisdictional and would be superseded by the Federal Rule provision that states that a copy of the

> summons and complaint may be sent by "registered or certified mail to the Attorney General of the United States."

676 F.2d at 1232.

Indeed, in 1960, Congress broadened the scope of the waiver of sovereign immunity by removing the restriction as to merchant vessels.[8] The amendments also authorized the transfer of cases between the U.S. district courts and the court of claims. S. REP. No. 1894, 86th Cong., 2d Sess. (1960). The purpose of the amendments was "to make certain as possible that suits brought against the United States . . . through breach of contract or tort can be originally filed in the correct court so as to proceed to trial promptly on the merits." *Id.* at 2. Because counsel often unavoidably chose an inappropriate form, the bill was enacted to prevent dismissal of suits which would otherwise become time barred. The Senate Committee on the Judiciary, in recommending the passage of the amendments also noted that "[t]he reform of existing practice embodied in [the] bill is another expression of the underlying philosophy of the federal rules of civil procedure and of modern legal practice generally, that the decisive question in a lawsuit should, as far as possible, be its merits and not esoteric, technical problems of procedure." *Id.* at 7. Through these amendments, Congress again expressed its intent to reduce any chance of procedural traps which would prejudice private litigants.

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[8] Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified at 46 U.S.C. § 742 (1982)).

As noted above, some courts have suggested that the SAA's forthwith service requirement constitutes an integral part of the government's waiver of sovereign immunity, and that Congress intended that immunity be maintained when service on the government is not forthwith. *E.g., Battaglia,* 303 F.2d at 685; *Kenyon,* 676 F.2d at 1232. This view of the forthwith requirement stems from the rule of statutory construction that "statutes which waive immunity of the United States from suit are to be construed strictly in favor of the sovereign." *McMahon v. United States,* 342 U.S. 25, 27 n.5 (1951). No rule of statutory construction requires, however, that each term within a statute waiving immunity be strictly construed. In fact, this Court has noted that narrowly construing specific terms of such a statute can defeat Congress's general intent to waive immunity. In *Indian Towing Co. v. United States,* this Court warned against "import[ing] immunity back into a statute designed to limit it." 350 U.S. 61, 69 (1955).[9]

Even Justice Friendly, who concurred in an opinion holding that the forthwith requirement constitutes an integral part of the government's waiver of immunity, remarked:

> I should have supposed that, once Congress gave the basic consent to sue the United States, as it did in the first sentence of § 2 of the Suits in

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[9] Echoing this Court's warning in *Indian Towing,* the court in *Weiss v. United States,* 168 F. Supp. 300, 301 (D.N.J. 1958), emphasized that a presumption in favor of immunity "does not mean that there must be a niggling and obnubilative adherence to the narrowest meaning of the words of the Act when the patent intent of Congress [is to waive immunity.]"

> Admiralty Act, it was content to have the courts decide the effect of various procedural lapses in the same manner as "if such vessel were privately owned or operated." The Act was "a comprehensive waiver by the United States" whereby "the government, in entering the shipping world as a participant, simply assumes a normal role in the antecedent pattern."

Battaglia, 303 F.2d at 686 (citation omitted) (*quoting* GILMORE & BLACK, ADMIRALTY 773-774 (1957)). Consequently, this Court should conclude that the procedures in Rule 4 govern actions brought under the SAA.

2. Because The Federal Rules Of Procedure Were Not In Effect At The Time Of Enactment Of The SAA, The Service Provisions In Rule 4 Are Controlling.

Congress's more likely intent for including the forthwith requirement in the SAA was simply to provide a time frame for service because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920. The Federal Rules of Procedure were not enacted until 1938.[10] These rules were adopted to "materially reduce the uncertainty, delay, expense and

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[10] By the Act of June 19, 1934 (the Rules Enabling Act), Ch. 651, 48 Stat. 1064, the Supreme Court was authorized to prescribe general rules of civil procedure for the district courts. The original rules, pursuant to the 1934 Act, were adopted by order of this Court on December 20, 1937, transmitted to Congress by the Attorney General on January 3, 1938, and became effective on September 16, 1938 (83 CONG. REC., pt. 1, p. 13; H. Doc. 460, 75th Cong., 3d Sess. (1938)).

the likelihood that cases may be decided on technical points of procedure which had no relation to the just determination of the controversy on its merits." H. R. REP. No. 2743, 75th Cong., 3d Sess. 3 (1938). The 1938 notes of the Advisory Committee pertaining to Rule 4 state that the Rule is intended to "provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof." H. DOC. 588, NOTES TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 75th Cong., 3d Sess., at 5 (1938).

In 1966, the federal rules were amended and applied to admiralty suits. 112 CONG. REC. 4053 (1966); H. DOC. 391, 89th Cong., 2d Sess. (1966). The rules then "govern[ed] the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty." These amendments were "designed to unify the civil and admiralty procedure," and together with the Supplemental Rules for Maritime and Admiralty claims completely superseded the admiralty rules. H. Doc. 391, 89th Cong., 2d Sess., at 23 (1966). The Advisory Committee's notes to the amended rules stated that the change was intended to "abolish the distinction between civil actions and suits in admiralty." *Id.* at 24.

The fact that the federal rules did not apply to admiralty suits until 1966 was a crucial part of the analysis of the court in *Jones & Laughlin Steel*. Indeed, it is significant that the leading authority construing the SAA's forthwith requirement was decided *prior* to the application of the federal rules to admiralty suits. *E.g. McAllister Bros.*, 278 F.2d at 708; *Battaglia*, 303 F.2d at 683. After Congress

combined civil and admiralty procedure, the Ninth, Fifth, and Eleventh circuits nonetheless rigidly followed the authority of the Second Circuit without an analysis of the amendments to the federal rules. *See, Owens*, 541 F.2d at 1386; *Holmberg*, 19 F.3d at 1065; *Libby*, 840 F.2d at 818.

Justice Boochever, in his concurrence in *Kenyon*, also touted the view that Rule 4 succeeds the forthwith service requirement because of the absence of procedural rules at the time of the enactment of the SAA. 676 F.2d at 1231. Specifically, he states:

> [I]f freed from the bounds of *stare decisis*, I would hold that the service provision of Section 742 [the forthwith requirement] does not constitute an integral part of the substantive waiver of sovereign immunity, but is a mere procedural provision necessary at the time of the statute's enactment, to effectuate that waiver.

Id. at 1232. For these reasons, the more likely intent of Congress in including the forthwith service requirement in the SAA in 1920 was to provide a procedural guideline because there were no uniform federal rules of procedure. Once the Federal Rules were enacted, and made applicable to admiralty suits, they supplanted the SAA's contrary forthwith requirement.

3. Similar Statutes Which Were Enacted In Order To Effectuate A Waiver Of Immunity Also Compel The Court's Adoption Of The *Jones & Laughlin Steel* Analysis.

Reference to similar statutes which effectuate a waiver of sovereign immunity also compels the conclusion that Rule 4 take precedence over the provisions of the SAA. In 1926, Congress enacted the Public Vessels Act (PVA) which waived sovereign immunity with respect to public as well as merchant vessels. Act of March 3, 1925, ch. 428, 43 Stat. 1112.[11] The PVA provided that suits brought under the act "shall be subject to and proceed in accordance with the provisions of [the SAA]." *Id.* In 1946, Congress then enacted the Federal Tort Claims Act [FTCA] which governed maritime torts committed by the government, except for those torts for which a remedy was provided by the SAA or PVA. Act of Aug. 2, 1946, ch. 753, §§ 401-424, 60 Stat. 842.[12]

By enacting the FTCA, which waived sovereign immunity for all other torts not covered by the SAA or PVA, Congress created causes of action against the government that previously had not existed. All three of these statutes, the FTCA, the SAA, and the PVA, cover the gamut of tort claims against the government and are mutually exclusive.[13] *Keene Corp. v. U.S.*, 700 F.2d 836, 843 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1984). In construing the FTCA, this Court has warned against "read[ing]

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[11] Current version at 46 U.S.C. §§ 781-790 (1982).

[12] Now 28 U.S.C. §§ 1346(b), 2671-2680 (1982).

[13] The FTCA expressly provides in section 2680(d) that it does not apply to suits in admiralty against the United States.

exemptions into the [FTCA] beyond those provided by Congress," *United States v. Muniz*, 374 U.S. 150, 166 (1963), and instructed that the FTCA is to be given a construction which will accomplish the legislative aim of relaxation of the rigor of sovereign immunity from suit. *Dalehite v. United States*, 346 U.S. 15, 30-31 (1953). Accordingly, this Court should adopt the same broad interpretation of the SAA as in the case of the FTCA. *See*, 54 FORDHAM L. REV. at 1200.

Equally persuasive is the fact that the FTCA is governed by and even incorporates Rule 4 of the federal rules. 28 U.S.C. § 2679; *E.g., Lambert v. United States*, 44 F.3d 296 (5th Cir. 1995); *Hunt v. Dep't of Air Force*, 29 F.3d 583 (11th Cir. 1994). If Congress therefore intended for the federal rules to govern procedure under the FTCA, there is no reason why the same procedure should not govern suits under the SAA. This Court has held that courts must interpret statutes on similar subjects with reference to each other.[14] *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). In other words, there is no reason why Congress would treat those injured at sea differently than those injured on land as far as service requirements are

[14] One commentator has suggested that these statutes should be construed *in pari materia* because they relate to tort actions against the government. *See* 54 FORDHAM L. REV. at 1207. "Construing the SAA and the FTCA *in pari materia* will lead courts to recognize that since Congress has intended these waivers to be interpreted liberally, courts should not regard the forthwith provision of the SAA as a jurisdictional precedent but rather a procedural device." *Id.* at n.48.

concerned. Such a distinction is particularly troublesome given that seamen are considered "wards of admiralty." *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377 (1932).

Similarly, reference to the Tucker Act,[15] a predecessor of the FTCA, also supports the inescapable conclusion that Rule 4 governs actions under the SAA. The Tucker Act creates jurisdiction in the United States Court of Federal claims and waives the government's sovereign immunity as to money damages for constitutional violations. 28 U.S.C. § 1491. When the federal rules of procedure became effective in 1938, the Tucker Act contained similar service provisions as those in the SAA. *See* 28 U.S.C. § 763 (1940 ed.). However, these service provisions were preempted by the enactment of Rule 4. Indeed, the Advisory Committee Notes to Rule 4 specifically listed section 763 among other statutes providing for service and stated that "[t]hese and similar statutes are modified in so far as they prescribe a different method of service or dispense with the service of a summons." H. Doc. 588, *supra*.

Similarly, courts considering conflicts between the new rules of procedure and various provisions of the Tucker Act concluded that the rules governed. *See Schram v. Koppin*, 35 F. Supp. 313, 314 (E.D. Mich. 1940); *Sherwood v. United States*, 112 F.2d 587, 590 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 584 (1941). In resolving a conflict

[15] Ch. 359, 24 Stat. 505 (1887); *see also*, 28 U.S.C. § 1346(a) (1982).

between service provisions in the Tucker Act[16] and Rule 4, the Eastern District of New York determined that the latter governed. *United States v. American Surety Co.*, 25 F. Supp. 700, 702 (E.D.N.Y. 1938). Specifically, the court stated: "It is to be presumed that the Supreme Court considered the problem of whether or not Sections 762 and 763 of 28 U.S.C.A. [the Tucker Act] were procedural or substantive and concluded that the procedure outlined therein could be altered by the new rules." *Id.* By analogy, this Court should also find that the service provisions in the SAA are governed by Rule 4.

4. Under The Rules Enabling Act, A Federal Rule Preempts A Federal Statute Governing Procedure.

The provisions of the Rules Enabling Act also militate in favor of a finding by this Court that Rule 4 supersedes the service provisions of the SAA. Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064. The Enabling Act was based on the Clayton Bill, first introduced in the House of Representatives in 1912.[17] The Clayton Bill specifically authorized the Supreme Court to prescribe "the mode and manner . . . of giving notice and service of process of all

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[16] The Tucker Act provided that upon filing his petition the "plaintiff shall cause a copy of his petition . . . to be served upon the district attorney . . . and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court . . . an affidavit of such service and the mailing of such letter." 28 U.S.C. § 763 (1940 ed.).

[17] H.R. 26,462, 62nd Cong., 3d Sess. (1912), reprinted in 38 A.B.A. Rep. 542 (1913).

kinds." *Id.* In 1914, the House Committee recommended the Clayton Bill's passage with an additional provision. The Committee recommended that language be included to the effect that all conflicting laws would become of no further force and effect. The Committee concluded that an express statutory repeal of inconsistent existing statutes was not only desirable, but "necessary."[18]

The Clayton Bill eventually evolved into the Rules Enabling Act of 1934.[19] The Act provides that the court rule "shall neither abridge, enlarge, nor modify the substantive rights of any litigant." 28 U.S.C. § 2072. The Act also states that " . . . all laws in conflict therewith shall be of no further force or effect." *Id.* Once enacted, the rules of procedure acquired the force of federal statutes "controlling all district courts." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941). It is thus clear that Congress intended a valid federal rule to supersede an inconsistent federal statute.

The details of service of process are precisely the type of procedural requirements the Federal Rules of Civil Procedure were designed to supplant. In fact, this Court has previously considered a conflict between Rule 4 service requirements and a contrary state statute in an analogous case. In *Hanna v. Plumer*, this Court decided that

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[18] *See* H.R. Rep. No. 462, 63d Cong., 2d Sess. 1, 16 (1914); Hearings on ABA Bills Before the House Comm. on the Judiciary, 63d Cong., 2d Sess. 22 (1914).

[19] *See* S. Rep. No. 1049, 73d Cong., 2d Sess. (1934); H.R. Rep. No. 1829, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 9362-63, 10,866 (1934). *Also see* Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1050-1098 (1982).

Rule 4, in allowing substituted service on an executor by leaving the process at his usual place of abode, supplanted a contrary state rule requiring in-hand service upon an executor. 380 U.S. 460 (1965). The rationale behind the decision in *Hanna* was that such details constituted matters of procedure governed by the Federal Rules. *Id.* at 473.

The analysis employed by the court in *Hanna* is also relevant to the conflict between the provisions of the SAA and Rule 4 in this case. In *Hanna*, this Court applied a two step analysis in determining whether the federal rules conflicted with prior law. First, this Court found that the conflicting rules must be examined. Under the first prong of the test, the "forthwith" requirement of the SAA and Rule 4 service requirements are clearly repugnant since courts have construed the term "forthwith" as considerably shorter than the 120 days allowed by Rule 4. If the rules have the same purpose, then one must be given preference over the other. *Id.* at 462-463; *also see* 54 FORDHAM L. REV. 1205-1206.

The second inquiry is whether the federal rule is within the Supreme Court's authority under the Rules Enabling Act and is constitutional. *Id.* at 464, 472. If so, then it is a valid rule superseding the conflicting rule. Because Congress has the inherent power to make rules governing practice and procedure in federal courts, *id.* at 472, this statutory scheme is constitutional. Rule 4(j) also falls within the Supreme Court's power under the Enabling Act because it does not effect the substantive rights of any litigant. Accordingly, Rule 4(j) is a valid federal rule which supersedes the "forthwith" provision of the SAA.

5. Alternatively, Rule 4 Was Enacted Pursuant To The Federal Rules Of Civil Procedure Amendments Act Of 1982 And Superseded The Provisions Of The SAA.

The circumstances surrounding the enactment of Rule 4 also compel a finding that Rule 4 supplants the provisions of the SAA. The Federal Rules of Civil Procedure are usually not the product of direct congressional legislation. As a general rule, the federal rules are promulgated by this Court pursuant to the Rules Enabling Act, 28 U.S.C. § 2072. Historically, Congress has acceded to the recommendations of the Supreme Court and adopted the rules as drafted by this Court. However, in adopting the 120-day requirement of Rule 4 in 1982, Congress exercised its power to reject the changes proposed by the Supreme Court and instead rewrote Rule 4 legislatively.

On April 28, 1982, this Court transmitted to Congress several proposed amendments to the Federal Rules of Procedure including the amendments to Rule 4 with the 120 day service requirement.[20] These amendments were to have taken effect on August 1, 1982. However, because of numerous complaints concerning proposed Rule 4,[21] Congress then enacted Public Law 97-227, postponing the effective date of the proposed amendments to Rule 4 until October 1, 1983. All other amendments to the Rules of Procedure took effect on August 1, 1982 as scheduled.

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[20] *See* 128 CONG. REC. 30930 (1982); H. DOC. 173, 75th Cong., 3d Sess. (1982).

[21] H.R. REP. No. 662, 97th Cong., 2d Sess. (1982).

In response to the widespread criticism of Rule 4, Congress then rejected the amendment outright and went to work in drafting its own rule. *See* David Siegel, *Practice Commentary on Amendment of Federal Rule 4 (eff. Feb. 6, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 88, 92 (1983). Congressman Don Edwards of California and Congressman McClory of Illinois introduced a bill to address in part the fact that the rule proposed by the Supreme Court did not address situations where service was defective through no fault of the party requesting service. H.R. REP. NO. 662, at p. 4; 128 CONG. REC. 30929-30934 (1982). Congress then passed the Federal Rules of Civil Procedure Amendments Act of 1982 and exercised its inherent power to reject the changes proposed by the Supreme Court. *See* H.R. 7154, 97th Cong., 2d Sess. (1982); 128 CONG. REC. 30929-30937, 32476-32477, 32904-32905, 33132 (1982). The present rule 4, including the 120 day service requirement and "good cause" exception, is the amendment drafted by Congress and not this Court. Pub. L. 97-462, § 2, 96 Stat. 2527 (1983).

When the court in *Amella, supra*, questioned the "dubious assumption" that the Federal Rules of Civil Procedure could amend an act of Congress, 732 F.2d at 713, the court did not even consider the fact that Rule 4 was drafted by Congress. Implicit in the court's reasoning in *Amella* and other circuit decisions in which the courts have found the "forthwith" requirement to be substantive, is that such rights cannot be altered except by Congress. However, this is precisely what Congress did in 1982 when it rewrote Rule 4 legislatively. *Also see* George Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4 – Process, Jurisdiction, and Erie Principles Revisited*, 19 WAKE FOREST L. REV. 957 (1983) (stating that "Rule 4(j) is

a statutory command under the Federal Rules of Civil Procedure Amendments Act of 1982, which is of equal dignity with the Enabling Act").

General principles of statutory construction further support the view that Rule 4(j) applies, and was intended to apply, generally to all actions filed in federal courts. When a general statute is enacted after a specific statute and is incompatible with the earlier specific statute, it is construed to supersede the specific statute. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). Furthermore, prior specific statutes are considered repealed by implication "when a comprehensive revision of a particular subject is promulgated. . . . " 1A J. SUTHERLAND, STATUTORY CONSTRUCTION, § 23.15, at 376 (5th ed. 1992).

When Congress established a 120-day period within which a complaint could be served, Congress intended to bring uniformity to the timeliness of service issue. Congress is presumed to be aware of existing statutes and judicial decisions when it enacts new legislation, and is presumed to intend to achieve a consistent body of law. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Thus, when Rule 4 was enacted, Congress is presumed to have been aware of the "forthwith" service provision in the SAA and the decisions construing that statute. If Congress intended there to be any exception to the general rule it was prescribing, it certainly could have created exceptions to Rule 4. However, no such intention appears in the language of Rule 4 or in the legislative history of the Rule. *E.g.*, 128 CONG. REC. 30929-30937, 32476-32477, 32904-32905, 33132 (1982). Because Rule 4 was legislatively written by Congress, this Court should conclude that it replaces the "forthwith" service provision.

C. The Fifth Circuit's Interpretation Of The SAA's Service Requirements Leads To Inconsistent Results.

Application of the forthwith service requirement rather than Rule 4's 120-day requirement leads to inconsistent results because the term "forthwith," in the words of one court is "inherently ambiguous." *O'Halloran*, 817 F. Supp. at 831. Courts across the country vary widely in their determinations of what is and what is not forthwith service. *E.g., Holmberg*, 19 F.3d at 1065 (holding that service on the United States 106 days following filing suit was not forthwith); *Kenyon*, 676 F.2d at 1231 (holding that service on the United States 60 days after filing suit was not forthwith); *Owens*, 541 F.2d at 1388 (holding that service on the United States 58 days after filing suit was not forthwith); *O'Halloran*, 817 F. Supp. at 831 (holding that service on the United States 77 days after filing suit was not forthwith); *Libby*, 657 F. Supp. at 1253 (holding that service on the United States 21 days after filing suit was forthwith). This bewildering variation among the courts in interpreting the term "forthwith" serves only to confuse litigants.

Prior to the 1982 amendments to Rule 4, the timeliness of service of process was judged by a "due diligence" standard, except in cases under the SAA. *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 550 (5th Cir. 1959); *Grammenos v. C.M. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1971). While "due diligence" and the "forthwith" language of the Act were defined differently by the courts, both shared a common infirmity: neither had a

clear definition of what was "due diligence" and "forthwith." This Court has often noted that courts and litigants are best served by bright-line rules, especially in cases involving harsh consequences such as the loss of a right to proceed to trial on the merits. *E.g., Houston v. Lack*, 487 U.S. 266, 267 (1988) (adopting bright-line rule recognizing inmate's notice of appeal filed upon receipt by prison authorities); *Budinich v. Becton Dickenson & Co.*, 486 U.S. 196, 202 (1988) ("courts and litigants are best served by the bright-line rule, . . . that a decision on the merits is a 'final decision' for purposes of § 1291"). By enacting the 120-day service requirement, Congress obviously intended to uniformly define the term for service in all federal litigation.

The lack of uniformity among the courts concerning the amount of time which is "forthwith" under the SAA also raises due process and equal protection concerns. U.S. CONST. Amend. V. Nothing in the language of Rule 4(j) or in the rules' legislative history suggests a legislative intent to exclude any class of federal actions from the 120-day service requirement, with the exception of service in a foreign country. In fact, there does not appear to be any other category of federal actions involving the United States that is not subject to Rule 4(j). *E.g., Lambert*, 44 F.3d at 296 (applying Rule 4 in suit based on the FTCA). Likewise, unwary litigants who fail to effect service "forthwith" are precluded from receiving a trial on the merits.

If Congress intended Section 742 to survive the enactment of Rule 4, that intention would at least be discernable from the language of the Rule or its legislative history. The "forthwith" requirement not only thwarts the

will of Congress, but produces a result contrary to the well-settled legislative and judicial policy of treating seamen as "wards of admiralty," whether they work on public or private vessels. *See e.g.*, THE JONES ACT, 46 U.S.C. § 688; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942). Certainly, Congress did not intend that seamen should find themselves subjected to a harsh and nebulous time limit for instituting their federal court actions from which their land-based brethren had been freed.

Arguably, when the SAA was enacted, Congress left the term "forthwith" deliberately undefined in order to allow the courts to determine "reasonableness" under the particular circumstances.[22] However, Rule 4 now provides a definite time limit which courts must implement in defining reasonableness under the circumstances; service of process occurring more than 120 days after the filing of a complaint is not diligent unless "good cause" is shown. At least one court has suggested that "even if Rule 4(j) does not supersede 46 U.S.C. § 742, reading the two in conjunction would seem to establish 120 days as an outside limit against which to judge the timeliness of service." *Libby*, 657 F. Supp. at 1253.

Even those courts that have employed the forthwith service requirement have expressed the opinion that the requirement failed to promote justice. In *Amella*, 732 F.2d

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[22] Black's Law Dictionary defines "forthwith" as "within a reasonable time under the circumstances of the case." BLACK'S LAW DICTIONARY, 588 (5th ed. 1979).

at 712, the Ninth Circuit affirmed the dismissal of a case that was not served "forthwith" with these remarks:

> Lawyers unfamiliar with the ways of admiralty or careless on their watch will encounter this statute as a hidden reef that can be a jurisdictional bar to an otherwise meritorious suit. . . . It is a sad case. . . . One of the "problems which a legal system must face is a combination of a due regard for claims of substantial justice with a system of procedure rigid enough to be workable," but § 742 appears to strike the balance too far in favor of formalism, to the detriment of justice. . . . If Congress were to take the statute off the books, we should feel no remorse; but until Congress awakes to action, we are bound by the statutory requirement.

Id. at 712, 714 (*quoting* 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 196 (1909)).

Likewise, the court in *Libby, supra*, when adopting the Third Circuit's holding that Rule 4 supplants the SAA's forthwith requirement stated:

> Adoption of this holding avoids the unnecessary delay and expense of litigation in cases of this type over whether a certain number of days is "forthwith" within the meaning of 46 U.S.C. § 742 [The SAA]. The policies of deciding cases on their merits and fostering judicial economy are better served by the definitive 120 day time limit established by Rule 4(j). . . . [T]his Court can see no reason to judicially maintain this trap for the unwary.

657 F. Supp. at 1252-53. Only this Court's adoption of Rule 4 in suits under the SAA can end the drastic variations among the lower courts in determining what constitutes forthwith service.

II. The Fifth Circuit's Interpretation Of The SAA's Service Requirements Restricts The District Courts' Power To Extend The Time For Service Under Any Circumstances.

The Fifth Circuit held that the district court's extension of the time for service in this case had no effect because the SAA's forthwith service requirement is jurisdictional in nature. 51 F.3d at 576. In other words, according to the Fifth Circuit, district courts lack the power to extend the forthwith service requirement under any circumstances. Thus, even the government's own failure to provide the necessary summons will not serve as a basis for enlarging the time to properly effect service.

Even if the forthwith service requirement applies to suits brought under the SAA, rather than Rule 4, the district courts should maintain the power to extend the time for service in appropriate circumstances. The Fifth Circuit previously addressed an analogous issue in *McCormick v. United States*, 680 F.2d 345 (1982). That case involved a suit under the SAA brought against the United States after the statutory limitations period had elapsed. The United States argued that because the SAA reflects a waiver of sovereign immunity, the limitations period is jurisdictional in nature and cannot be tolled under any circumstances. *Id.* at 350. The Fifth Circuit rejected the United States' argument, relying heavily on this Court's

decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

In addressing the issue of whether a limitations period in a federal statute providing a new cause of action could be tolled, this Court in *American Pipe* concluded:

> [T]he mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

Id. at 559. Heeding *American Pipe*, the Fifth Circuit held in its own decision on the issue:

> We cannot accept the government's position, and the district court's holding that the SAA limitations provisions can never be tolled. We hold that the two-year limitation on suits under the SAA can be tolled under appropriate circumstances where to do so would not defeat the purpose of the provision, which is to encourage those with claims against the United States to present their claims promptly and diligently, and where injustice to the plaintiff would otherwise result.

McCormick, 680 F.2d at 351. Likewise, federal courts should possess the power to extend the forthwith service requirement under the SAA in appropriate circumstances despite the fact that the SAA's forthwith service requirement may be jurisdictional in nature.

The facts of this case further illustrate the need for a precise rule which would allow the courts to extend the time period for service in suits under the SAA. Here, Henderson immediately requested the appropriate summons forms from the district clerk's office at the time he filed his complaint on April 3, 1993 (App. 42, 51). However, it was the district clerk's own lack of diligence and failure to include the proper seal on the summons which resulted in the delay in service upon the government (App. 42, 51-52, 57-64). In fact, Mr. Henderson's counsel was not notified until June 1, 1993 about the defect in the summons because of the absence of the court's seal (App. 52, 57-58). Although new summons forms were immediately requested by Mr. Henderson's counsel upon learning of the defect, the substitute summons forms were not received until August 25, 1993, again because of delay by the district clerk's office (App. 52, 59-64). It would be ironic indeed to disallow a litigant to receive additional time to effect service upon the government when it is the government's own delay which resulted in the need for that extension.

Furthermore, a refusal to allow courts to grant extensions under appropriate circumstances undermines the underlying purpose of serving a defendant with process: that is, to provide litigants with notice of a pending lawsuit. For example, in the present case, Mr. Henderson sustained his injuries on August 27, 1991, and filed his lawsuit on April 8, 1993, well within the limitations period (App. 5-12). However, his case was dismissed because he was not able to effect service until September 3, 1993, only a few days after limitations expired (Pet. App. 8). On the other hand, a litigant who waits until the

day before the limitations period expires, and who then takes an additional thirty days to effect service, would be able to maintain his suit under existing law. In other words, the government is first put on notice of the suit and served under the second scenario at a later date than what exists in this case, yet that suit is presumed valid while Mr. Henderson's lawsuit is not.[23] Simply stated, the law lends itself to arbitrary and unjust results, and it fails to promote the policy of preventing stale claims.

Equally frustrating is the fact that still other admiralty litigants who inadvertently file their complaint based upon the incorrect statute can avoid the "forthwith" requirement. For example, in *Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1436 (9th Cir. 1983), the court considered a situation where although the case was filed five days before the statute of limitations expired, service of process did not occur until over one hundred days later. The plaintiff had also erroneously filed his claim based upon the Federal Tort Claims Act instead of the SAA. *Id.* at 1436. The trial court allowed the plaintiff to amend his complaint to state a proper basis for jurisdiction under the SAA, and the court of appeals affirmed that decision. The court found that the plaintiff's original failure to comply with the forthwith service requirement of the SAA was irrelevant because the plaintiff's subsequent filing and service were properly allowed under existing law to relate back to the original filing under

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[23] In fact, in this case, the government was first put on notice of Mr. Henderson's lawsuit when the Attorney General was served on May 25, 1993 (App. 42, 52), more than three months before the two-year statute of limitations ran.

Rule 15(c). *Id.* Consequently, under the present state of the law, "the poorer pleader" will be able to maintain his suit, while another litigant who stated a proper basis for jurisdiction would not. *Libby*, 657 F. Supp. at 1253 n.4.

In this case, given the difficulties Mr. Henderson faced in serving the United States, the district court considered an extension of time appropriate. The district court's evaluation of the circumstances should be respected even if the forthwith requirement governs the time for service under the SAA. Allowing an extension in appropriate circumstances does not defeat the purpose of prompt service on the United States and protects the plaintiff against injustice when the failure to serve the United States forthwith is inadvertent and dismissal results, as it did here, in a lost cause of action.

CONCLUSION

Petitioner respectfully urges this Court to reverse this case and decide that Rule 4's 120-day service requirement supplants the SAA's forthwith service requirement. Alternatively, Petitioner respectfully urges this Court to decide that district courts may extend the time for service provided by the SAA in appropriate circumstances. This case should be reversed and remended for trial on the merits.

Respectfully submitted,

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